

APR 12 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

Clerk, U.S Courts
District Of Montana
Missoula Division

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

BENJAMIN CALVIN BROOKS,

Defendant/Movant.

Cause No. CR 17-16-BU-DLC
CV 19-17-BU-DLC

ORDER DISMISSING § 2255
MOTION AND DENYING
CERTIFICATE OF
APPEALABILITY

On April 12, 2019, Defendant/Movant Brooks filed a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. Brooks is a federal prisoner proceeding pro se.

Brooks's motion also requests the return of cash he claims was taken from him. That part of the motion is addressed in a separate order.

Brooks pled guilty to being a felon in possession of a firearm and was sentenced to serve 30 months in prison. *See Minutes (Doc. 76); Judgment (Doc. 100) at 2–3.* On May 7, 2018, he filed a timely notice of appeal. The appeal is pending in the Ninth Circuit Court of Appeals. Oral argument is currently set for June 4, 2019. *See United States v. Brooks, No. 18-30099 (9th Cir. filed May 7, 2018).*

A § 2255 motion is the equivalent of a petition for writ of habeas corpus.

See, e.g., United States v. Hayman, 342 U.S. 205, 210–19 (1952). “Habeas review

is an extraordinary remedy and will not be allowed to do service for an appeal.”

Bousley v. United States, 523 U.S. 614, 621 (1998) (quoting *Reed v. Farley*, 512

U.S. 339, 354 (1994), and *Sunal v. Large*, 332 U.S. 174, 178 (1947)).

Consequently, district courts do not consider § 2255 motions while an appeal is pending or before the time for seeking further direct review has expired. *See, e.g.*,

Feldman v. Henman, 815 F.2d 1318, 1320 (9th Cir. 1987) (as amended); *United*

States v. Deeb, 944 F.2d 545, 548 (9th Cir. 1991); Rule 5, Rules Governing § 2255

Proceedings for the United States District Courts, advisory committee’s note

(quoting *Womack v. United States*, 395 F.2d 630, 631 (D.C. Cir. 1968)); *see also*

United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997).

The Court will not entertain a § 2255 motion unless and until Brooks’s direct appeal is exhausted, including any proceedings in the United States Supreme Court. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). When it is the appropriate time to file a § 2255 motion, Brooks will be required to assert in one motion all claims for relief he wishes the Court to consider. *See generally* 28 U.S.C. §§ 2255(h), 2244(b).

This law is well-settled. A certificate of appealability is not warranted.

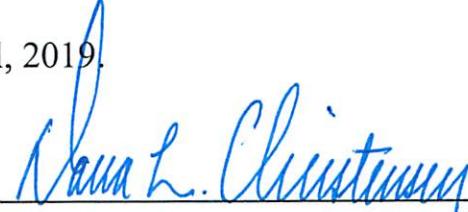
Gonzalez v. Thaler, 565 U.S. 134, 140–41 (2012) (quoting *Slack v. McDaniel*, 529

U.S. 473, 484 (2000)).

Accordingly, IT IS ORDERED:

1. Brooks's § 2255 motion (Doc. 128) is DISMISSED WITHOUT PREJUDICE as premature. No action will be taken on it.
2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Brooks files a Notice of Appeal of this Order.
3. The clerk shall close the civil file by entering a judgment of dismissal.

DATED this 12th day of April, 2019.



Dana L. Christensen, Chief Judge
United States District Court